United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

NO. 75-1180

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

RICHARD HUSS and JEFFREY SMILOW,

Appellants.

On Appeal from the United States District Court for
The Southern District of New York

APPELLANTS' REPLY BRIEF

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The government's brief avoids the two basic contentions of our initial brief, and focuses instead -- in more than 13 1/2 pages of its 21 page argument section -- on extensive quotations from the statements made by Judge Griesa before sentencing, and on portions of the Hurok trial proceedings before Judge Bauman which served as the basis for appellants' contempt citations and ultimate convictions.

1. We do not contend in this appeal that appellants should not have been found guilty of criminal contempt. This Court has already dealt with that issue in Nos. 74-2047 and 74-2127. Nor do we contend that the offense of criminal contempt is not serious or should be overlooked by the federal

courts. Our contentions are simply that Judge Griesa abused his discretion in imposing one-year sentences upon appellants in that there were no extraordinary circumstances warranting so severe a result and, more importantly, because there were substantial matters in mitigation which he failed properly to consider. Additionally, it is our contention that in denying appellants' motion for reduction of sentence, Judge Griesa focused on certain improper considerations.

The government asserts that "Judge Griesa gave careful consideration to . . . [the mitigating] aspect of [appellants'] contempts in imposing sentence and in denying their motion to reduce sentence." (Gov. Br. 8). But in reviewing the transcript on which the government relies, one finds only one "mitigating" sentence in the four-page statement made at sentencing and, similarly, only one sentence in the three-page remarks made in denying appellants' motion for reduction of sentence (Gov. Br. 10, 13). In fact, as the quoted portions of Judge Griesa's statements reveal, appellants' motivations were not at all dealt with as potentially mitigating factors, but rather as aggravating factors which warranted a more severe punishment for contempt.

It is this fundamental misapprehension of the nature and meaning of "mitigating circumstances," as employed by this Court in Levine v. United States, 288 F.2d 272, 274 (2d Cir. 1961), which we believe constituted error by the sentencing

judge.

"Every criminal contempt is a violation of a court order; the requirement that mitigating factors be considered is intended to ameliorate the consequences when the affront to the dignity of the Court is not wholly malicious. We recognize, of course, that the grounds upon which the appellants' refused to testify was not a sufficient legal defense. The reasons they gave and stood by indicated, however, that their conduct was not "shockingly contemptuous." In re Van Meter, 413 F.2d 536, 538 (8th Cir. 1969). If fear for personal safety is a mitigating circumstance (even if it is not a total legal defense) -- see, in addition to Levine, United States v. Leyva, 413 F.2d 774 (5th Cir. 1975) -- fear of divine or supernatural punishment (which inheres in any religious claim) should be given at least equal consideration. Other appellate courts dealing with comparable issues have given weight to matters such as the degree of deliberate or willful defiance, even if they do not amount to total legal defenses. See, e.g., United States v. Bukowski, 435 R.2d 1094, 1110 (7th Cir. 1970), cert. denied, 401 U.S. 911 (1971); In re Van Meter, supra, 413 F.2d at 850-851; United States v. Conole, 365 F.2d 306, 308 (3rd Cir. 1966), cert. denied, 385 U.S. 1025 (1967).

2. The government also seeks to establish that sentences of more than six months for convictions of criminal contempt

for refusal to testify are more or less routine, so that these sentences were within the bounds of normal sentencing standards. In support of this proposition the government cites 11 cases from this and other Circuits. (Gov. Br. 26). Three of the cited cases (Braden v. United States, 365 U.S. 431 (1961), aff'g 272 F.2d 653 (5th Cir. 1959); United States v. Orman, 207 F.2d 148 (3rd Cir. 1953); and United States v. Costello, 198 F.2d 200 (2nd Cir.), cert. denied, 344 U.S. 874 (1962)), are entirely different in that all dealt with violations of 2 U.S.C. 192 (contempt of Congress). Congress has no real alternative procedure by which to compel compliance with its directives to testify. Civil contempt is not a practical alternative (since it would require the Congress itself to take custody of the witness). Hence criminal contempt sentences serve both to coerce compliance and to punish for refusal to testify. Moreover, Congress has specifically presented a maximum punishment for this offense in 2 U.S.C. §192.

Another group of cases cited -- United States v. Shillitani, 345 F.2d 290 (2nd Cir. 1965), vacated and remanded, 384 U.S. 364 (1966); United States v. Tramunti, 343 F.2d 548 (2nd Cir. 1965), vacated and remanded, 384 U.S. 886 (1966); United States v. Pappadio, 346 F.2d 5 (2nd Cir. 1965), vacated and remanded, 384 U.S. 364 (1966); United States v. Castaldi, 338 F.2d 883 (2nd Cir. 1964), vacated and remanded, 384 U.S. 886 (1966). -- are distinguishable because in each instance, as the Supreme

Court found, the trial court was imposing "coercive imprisonment," which was really civil contempt -- even if denominated as criminal. So, too, in United States v. Harris, 334 F.2d 460 (2d Cir. 1964), rev'd, 382 U.S. 162 (1965), the Supreme Court did not reach the merits of the sentence imposed since it found procedural violations in the use of Rule 42(a) of the Federal Rules of Criminal Procedure. Interestingly enough, this Court reduced a subsequent one-year criminal contempt sentence to six months in United States v. Harris, 367 F.2d 826 (2d Cir. 1966) cert. denied, 385 U.S. 1010 (1967), partly because the defendant was not afforded a jury trial and "in the exercise of the 'peculiar power of the federal courts to revise sentences in contempt cases.'" 367 F.2d at 837. Levine was cited. Presumably, this Court concluded that a six-month sentence was adequate, and did not simply vacate and offer the prosecution the opportunity to retry Mr. Harris before a jury to obtain a sentence of more than six months.

The two remaining cases cited by the government are United States v. Leyva, 513 F.2d 774 (5th Cir. 1975), and United States v. Sternman, 433 F.2d 913 (6th Cir. 1970). In Sternman there was no claim of any mitigating circumstances, and in Leyva a 35-year sentence imposed on a hardened criminal asked to testify about heroin trafficking was reduced to two years -- less than 6 percent of the term given by the district court. Appellants' reliance on substantial mitigating factors as well as their age and the fact that, apart from JDL actions they

have led exemplary lives, leads us to wonder how the Leyva and Sternman cases can be thought to control. From Anderson v. Dunn, 19 U.S. 204, 231 (1821), on through the most recent criminal contempt cases, courts have echoed the proposition that punishment for criminal contempt should reflect "the least possible power adquate to the end proposed."

Where as here, the trial judge concedes that "[t]he materials which have been submitted to me do not indicate that there is any real necessity for rehabilitation as far as the events with which we are involved here" (Govt. Brief at 11; App. 148-149), the use of a one-year sentence as a purely punitive measure far exceeds the "least possible power adequate to the end proposed."

3. Moreover, despite the government's protestations to the contrary, the quoted record of Judge Griesa's denial of appellants' motions for reduction of sentence (referred to in our brief at 13) reflects that the court's denial was in fact based substantially upon the judge's appraisal of the Hurok trial, at which the appellants refused to testify. Judge Griesa had previously indicated that, in his view, the appellants had participated in that offense and been responsible for the death of a victim of that conduct (App. 405). For these reasons, we now believe that the severe sentence the appellants received was based on an unsubstantiated and unproved factual assumption which had no proper place in the

sentencing decision.

4. One final note on a recent development which was not before the district court or even before this Court when our initial brief was filed. These appellants are the same individuals whose motion to secure Kosher food while in federal custody was denied -- after a full hearing -- by Judge Griesa and then dismissed, for lack of jurisdiction, by this Court. United States v. Huss & Smilow, No. 75-1192, decided July 25, 1975. It appears from the ruling by this Court that, on account of a jurisdictional legal judgment by the undersigned counsel which this Court subsequently found to be erroneous (notwithstanding the government's knowing and deliberate joinder in that judgment), appellant Smilow has gone through several months of imprisonment without receiving a nutritionally sufficient diet. The impact of such a term of imprisonment should, we believe, be weighed by this Court in the present appeal. A prisoner who is in custody for six months without cooked meat or fish and is given a diet which requires him to violate his religious convictions to eat any cooked foods (including vegetables) during any meal is surely the equivalent of double that time to the ordinary prisoner. This Court should not ignore the reality of Mr. Smilow's incarceration in deciding whether -- under all the circumstances -- his sentence was excessive.

We conclude by noting that we are not requesting this Court to determine the proper length of sentence which should be imposed. For this Court to do so would constitute an invasion of the discretion invested by Congress in the trial court. Rather, our point is that a dispassionate application of the standards judicially announced cannot justify a sentence greater than six months.

CONCLUSION

For the foregoing reasons, the order denying appellants' motion for reduction of sentence should be reversed and their sentences reduced to six months' imprisonment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 1975, I caused two copies of the Appellants' Reply Brief to be mailed, first class mail, postage prepaid, to Robert Gold, Esq. Assistant United States Attorney, United States Courthouse, Southern District of New York, New York, 10007.

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